IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

S.No.	ITA No.	AY	Appellant	Respondent/ Cross Objector
1&2	342/H/15 and C.O. No. 65/H/16	2009-10	Income-tax Officer, Ward – 7(3), Hyderabad.	Kosetty Kishore, Hyderabad. PAN – AKJPK7013Q
3 & 4	343/H/15 and C.O. No. 66/H/16	2009-10	-do-	Kosetty Nagaraju, Hyderabad. PAN – AEDPR 3702Q
5	765/H/17	2009-10	Asst. Commissioner of Income-tax, Circle – 7(1), Hyderabad.	Shri K. Gopal Raj, Hyderabad. PAN – AIBPK 1167E
6	773/H/17	2009-10	Shri K. Gopal Raj, Hyderabad. PAN – AIBPK 1167E	Dy. Commissioner of Income-tax, Circle – 1(3), Hyderabad.

Revenue by: Esther N. Hangal
Assessee by: Shri K.C. Devdas

Date of hearing: 28/11/2018
Date of pronouncement: 15/02/2019

O R D E R

PER S. RIFAUR RAHMAN, AM:

Appeals in ITA Nos. 765 & 773/Hyd/2017 are cross appeals against the order of CIT(A) – 3, Hyderabad, dated 03/02/2017 in the case of Shri K. Gopal Raj. The other two appeals in ITA No. 342 & 343/H/2015 filed by the revenue and CO Nos. 65 & 66/Hyd/16 filed by the assessees against the orders of CIT(A) – 3, Hyderabad. As identical issues are

involved in all these appeals, they were clubbed and heard together and therefore, a common order is passed for the sake of convenience.

ITA No. 765 & 773/Hyd/2017 by the assessee and the revenue

2. The factual details and background of the case are that the assessee, is an individual, and there was search and seizure operation u/s 132 of IT Act 1961 in the residential premises of the assessee on 07.07.2008. He filed return of income for A.Y.2009-10 on 30.07.2009 admitting income of Rs.58,28,850/-. The scrutiny assessment u/s 143(3) was completed on 19.11.2010 assessing the income at Rs.58,86,933/-.

2.1 During the course of search proceedings certain documents identified as A/GR/RES/01 were seized. These were the copies of development agreement and the supplementary agreement entered by the assessee with M/s Legend Estates Pvt. Ltd.

2.2 Vide development agreement dated 3.2.2007 the assessee Sri Kosetti Gopal Raj and his sons Sri K. Nagaraju and Sri K. Kishore Kumar entered into an agreement with M/s. Legend Estates Pvt Ltd for development of land of 6 Acres and 39 Guntas located at Survey No.102 at Serilingampally Mandai, Rangareddy District. On this day, an amount of Rs. 1,25,000/- was paid through cheque by the developer to the assessee as returnable earnest money deposit. The agreed sharing ratio of constructed portion was 50:50. The agreement was registered and was irrevocable. As per clause 8 of agreement the possession of the property would be handed over to the developer on obtaining building approval plan from

HUDA. As per this agreement, the project shall be completed within 36 months from the date of approval of layout plan with a grace period of 6 months. Beyond grace period, For the delay of first 6 months the owner would get compensation @ Rs.5/- per sft. If there is any further delay the owner would get compensation @ Rs.15 per sft.

2.3 On the same day i.e. 3.2.2007 there was supplementary agreement between Sri Kosetti Gopal Raj and his sons with M/s. Legend Estates Pvt Ltd, through this agreement another amount of Rs.2 Crores was paid through cheques. Further, an amount of Rs.9,98,75,000/- was to be paid as returnable earnest money deposit on the date of handing over possession to the developer after obtaining the approval from HUDA/Municipality. This supplementary agreement is un-registered. Thus by the time the property was handed over, an amount of Rs.12 Crores was received by the assessee. As per clause 5 of this agreement this sum of Rs.12 Crores should be refunded to the developer after completion of residential complex or it can be adjusted towards built-up area at the end. The assessee received total 12cr as refundable deposit.

2.4 There was another supplementary agreement dated' 30.10.2010 in which the sharing ratio was altered to 38.5%(owner):61.5%(developer) in view of down trend in real estate market. Except this the rest of conditions remained unaltered. This agreement is registered.

2.5 There was another supplementary agreement dated 11.02.2011 between the owners and M/s. Legend Estates Pvt Ltd and M/s. RBD Legend Infrastructure Pvt Ltd through which the entire development activity will be carried on by M/s. RBD Legend Infrastructure Pvt Ltd. In this agreement it is

mentioned that GHMC had approved the plan on 05.08.2008 i.e. after obtaining GHMC approval the sharing ratio was altered from 50:50 to 38.5:61.5. This agreement is unregistered. In Clause 3 of this agreement the assessee acknowledges the receipt of Rs.12 Crores.

2.6 There was another supplementary agreement dated 6.11.2012 incorporating all contents of supplementary agreement dated 11.2.2011. This agreement dated 6.11.2012 was registered.

2.7 Originally the Assessing Officer brought the capital gain to tax in A.Y.2008-09 taking the date of transfer as 17.11.2007.It is pertinent to mention that an unsigned and un registered agreement dated 17.11.2007 was found during search. The capital gains assessed in this order was Rs. 61,50,25,350/-.

2.8 On first appeal, the CIT(A) vide his order dated 28/11/2011 directed the AO to bring the capital gains to tax for the AY 2009-10 as the possession of land was handed over after obtaining the municipal permission on 05/08/2008.

2.9 On further appeal both by Department and the assessee, the coordinate bench of this Tribunal vide ITA No.140/Hyd/2012 dated 30.08.2013 upheld the order of CIT(A) and directed the Assessing Officer to examine the taxability of capital gain for A.Y.2009-10 subject to Sec.149, 150 and 153 of the IT Act. The relevant para of Hon'ble Tribunal is repeated as under:

> *"As can be seen from the registered development agreement dated 03/02/2007 with Legend Estates Pvt Ltd., developer was entrusted to develop the property belonging to the assessee along with other co-owner. As per Clause 5 of the development agreement*

irrecoverable right was given to the developer for developing the property. As per Clause 8 of the development agreement, the actual possession of land would be deemed to have been handed over to the developer after obtaining permission from the GHMC. As per the material available on record, permission from GHMC was obtained on 05/08/2008. Hence, possession of the property would be deemed to have been handed over to the developer after obtaining permission from GHMC on 05/08/2008. This is further evident from the fact that the developer in fact has started development activity after obtaining permission by making substantial investment. Therefore, neither the execution of development agreement and payment of the security deposit of ("12 crores nor taking over the possession by the developer of the property happened during the impugned assessment year. In the aforesaid view of the matter the CIT(A) was correct in holding that under no circumstances the capital gain could have been charged to tax in the impugned assessment year. The ratio laid down by the Hon'ble Bombay High Court in case of Chaturbhuj Dwarakadas Vs ACIT, 260 ITR 491 (Bom.) and K. Radhika Vs DCIT, ITAT, Hyderabad, 47 SOT 180, also support the view that the capital gain cannot be charged to tax in the impugned assessment year i.e. 2008-09. However, it is a fact on record that the developer was handed over the possession of the property after obtaining permission from GHMC on 05/08/2008 and further the second development agreement executed on 11/02/2011 with RBD Legend, though, is an unregistered document, however, clearly reveals that the earlier developer i.e. Legend Estates Pvt Ltd has not only taken possession of the property but has also started construction of the project. Furthermore, the registered development agreement with M/s Legend Estates P. Ltd has not been cancelled. Therefore, it cannot be said that the developer Legend Estates P.Ltd has backed out or expressed its unwillingness in carrying out the development activity. The development agreement executed on 11/02/2011 being an unregistered document it cannot have much relevance. In the aforesaid circumstances. therefore, the conclusion arrived at by the CIT(A) to the effect that there is a transfer within the meaning of section 53A read with section 2(47)(v) of the Act cannot be held to be without any substance. The aforesaid conclusion of the CIT(A) certainly is capable of being examined in the light of the ratio laid down by the Hon'ble Bombay High Court in case of Chaturbhuj Dwarakadas Vs ACIT, 260 ITR 491 (Bom.) and K. Radhika Vs DCIT, ITAT,

Hyderabad, 47 SOT 180. We, therefore, do not find any infirmity in the order of the CIT(A) in directing the Assessing Officer to examine the issue of taxability of capital gain in the assessment year 2009-10 when his powers under the statute are co-terminus with that of the Assessing Officer. In our view the statute has neither put any fetters not the CIT(A) is powerless in directing the Assessing Officer to examine the taxability of a particular income in an approximate assessment year even if he finds it not taxable in the assessment year under dispute. The assessee certainly cannot have any grievance in assessability of an income in a particular assessment year if otherwise it is taxable in that assessment year in accordance with law. In the facts of the present case the CIT(A) has directed the Assessing Officer to examine the taxability of capital gain in assessment year 2009-10. However, such direction of the CIT(A) is subjected to the provision contained in Sections 149, 150 and 153 of the act. It is open for the assessee to put forward his contentions with regard to the taxability or otherwise of the capital gain in the concerned assessment year during the assessment proceeding of that assessment year. The Assessing Officer certainly has to consider the assessee's contention keeping in view the ratio laid down in the judicial precedents governing this issue and thereafter taking a decision in the matter. The decisions relied upon by the learned AR are clearly distinguishable on fact and are not applicable to the case of the assessee. In the aforesaid view of the matter, we are not inclined to entertain the grounds raised by the assessee, which are accordingly dismissed."

2.10. Subsequently the Assessing Officer issued notice u/s 148 dated 30.08.2013 which was served on the assessee's son Sri K.Nagaraju on 06.09.2013.

2.11 Reassessment Order u/s 143(3) r.w.s. 147 dated 31.03.2015 was passed assessing the capital gains at Rs.54,94,81,659/-.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) by raising the following objections through his additional grounds, which are summarized as under.

"(a) That notice u/s 148 was served on Sri K.Nagaraju, S/o assessee and not on assessee himself.

(b) The capital gain was originally assessed in A.Y.2008-09, it is only at the instance of CIT(A) the assessment for A.Y.2009-10 was re-opened by the Assessing Officer.

(c) The CIT(A) while deciding the appeal for A.Y.2008-09 is not

competent to give direction to consider the capital gain for A.Y.2009-10. (d) The reasons recorded by Assessing Officer for re-opening the assessment in A.Y.2009-10 were very much available when Assessing Officer passed assessment for A.Y.2008-09.

(e) The notice u/s 148 dated 10.9.2014 was issued beyond four years from the end of the assessment year therefore it is time barred.

Each of the objections raised by assessee are dealt with as under."

4. As regards validity of notice u/s 148, the CIT(A) upheld the action of AO by observing that in this case assessment for AY 2008-09 was completed on 19/11/2010 and on this date of 19/11/2010, notice u/s 148 could be issued for AY 2009-10, hence, notice u/s 148 dated 30/08/2013 is perfectly valid.

4.1 As regards merits of the case, the CIT(A) elaborately discussed the issue at length with various case law as well as referring to the Finance Bill 2017, directed the AO to tax the capital gains in the year of completion of project taking sale consideration at stamp duty value or actual consideration received, whichever is higher.

5. Aggrieved by the order of CIT(A), the assessee as well as revenue are in appeal before us raising the following grounds of appeal:

5.1 Grounds raised by the assessee:

"1. The learned CIT(A)-3, Hyderabad (CIT(A) having held that no capital gains was assessable for asst. year 2009-10 ought to have clearly held that in the absence of the basis for quantification of long term capital gains at Rs. 54,94,81,659 not having been clearly spelt ought to have annulled the computed figure of Rs..54,94,81,659.

2. The learned (CIT(A) ought to have clearly held that the entire re-assessment proceedings u/s.147 rws 148 are illegal without jurisdiction and bad in law as the learned DCIT has reopened the assessment on the basis of the order of the CIT(A)-I, Hyderabad in his order dated 28/11/2011 passed for the AY 2008-09 without forming an opinion of his own that income of the assessee has escaped assessment.

3. The reasons recorded if any has no nexus with the income escaping assessment and therefore the entire re-assessment proceedings are invalid, bad in law and therefore the re-assessment proceedings must be quashed.

4. The learned CIT(A) failed to note that in the reasons recorded the monetary limit of income escaping assessment not having been specified as enjoined in section 149 of the I.T. Act, 1961, the entire re-assessment proceedings has no legs to stand, and calls for annulment.

5. The learned CIT(A) failed to note that the order passed by the CIT(A)-I, Hyderabad in ITA No.0185/CC-6/Hyderabad dated 28/11/2011 calling upon the AO to examine the assessability of capital gains in the AY 2009-10 in an appeal preferred for the AY 2008-09 was not a finding or direction necessary for the disposal of the appeal for the AV 2008-09 and therefore the learned DCIT ought to have quashed the reassessment proceedings.

6. The order of the Commissioner of Income-tax (Appeals)-I, Hyderabad passed for assessment year 2008-09 on 28/11/2011 in holding that the capital gains arising out of development agreement on 3/2/2007 is taxable in the AY. 2009-10 arising out of an appeal filed for AY. 2008-09 which was not before the CIT(A) is contrary to provisions of law and hence, the action of the AO in reopening the assessment u/s.148 of the I.T.

Act on the basis of the aforesaid CIT(A) order is without jurisdiction and not binding on the AO and therefore the entire reassessment proceedings initiated by the AO is without jurisdiction, bad in law and therefore must be quashed.

7. The learned CIT (A) failed to note that the CIT(A)-I, Hyderabad in ITA No.185/CC-6/Hyderabad passed an order on 28/11/2011 to examine the assessability of the capital gains for the AV 2009-10 and therefore U/s.153 (2A) of the I.T. Act, 1961 the examination by reopening ought to have been done by 31/03/2013 while the reassessment proceedings were initiated by issue of a notice u/s.148 dated 10/09/2013 and therefore the CIT(A) ought to have clearly held that the order suffers from incurable infirmity and therefore ought to have quashed the re-assessment proceedings.

8. The reasons recorded by the AO to reopen the assessment proceedings is on the same set of facts which were in existence when the assessment order was passed for AY. 2008-09 and therefore, there was no fresh material in the possession of the AO to reopen the assessment proceedings and in the absence of any tangible material there was no nexus between the reasons recorded and the income escaping assessment and therefore the reopening proceedings are bad in law, invalid without jurisdiction and therefore must be quashed.

9. The learned CIT(A) failed to note that the provisions of section2(47)(v) of the I.T. Act, 1961 governed sales transactions where possession was given without registration and therefore ought to have clearly held that the transactions relating to the development agreement were outside the scope of the aforesaid section and thus ought to have clearly held that no income accrued to the assessee in the AY. 2009-10.

10. The learned (CIT(A) ought to have clearly held that the DCIT erred in coming to a suo motto conclusion without accosting the assessee with the website information of M/s. Legend Estates Pvt. Ltd. to come to a conclusion that the developer was willing to perform his terms of the development agreement while the projects have been executed by RBD Legend Infrastructure Pvt. Ltd.

11. The learned CIT(A) failed to note that M/s. Legend Estates Pvt. Ltd. who was the first developer under the

agreement of 03.02.2007 was unwilling to perform his terms of the contract and the second developer also having done only 5% of the project there was no substantial compliance and thus the unwillingness and readiness is clearly brought out as the development agreement executed on 03/02/2007 is pending as on date and therefore ought to have clearly held that being no substantial compliance, and thus there was no transfer whatsoever to levy capital gains.

12. The learned (CIT(A) ought to have directed the adoption of the value of the land as on 01/04/1981 at 10% of the total deemed sale consideration as held by the Karnataka HC in the case of Smt. Krishna Bajaj through L/R Deva Raj Bajah Vs. CIT, Bangalore reported in (2014) 100 DTR (Kar.) 370.

13. The learned (CIT(A) erred in not allowing the exemption U/s.54F of the I.T. Act, 1961 in respect of all the residential flats to which the assessee was entitled to.

14. The assessee denies its liability to be assessed to the levy of interest u/s.234A at Rs.1,75,83,413 as there was no delay in submitting the return of income u/s.148.

15. The assessee denies its liability to be assessed to the levy of interest u/s. 234B at Rs.6,57,81,724 as there was no delay in submitting the return of income u/s.148 and not the calculation of interest should run from the date of completion of original assessment to the date of completion of reassessment.

16. The learned CIT(A) having held that the transfer takes place only when the project is completed to tax the capital gains in the year of completion of project by adopting sale consideration at stamp duty value or actual consideration received whichever is high.

17. Any other ground or grounds that may be urged at the time of hearing."

5.2 Grounds raised by the revenue:

"1. The Ld. CIT(A) erred both in law and on facts of the case.

2. The Ld. CIT(A) erred in deleting the addition of Rs. 54,94,81,659/- being Long Term Capital Gains.

3. The Ld. CIT(A) erred in applying the provisions of Finance Bill 2017 to the transaction entered prior to 01-04-2017.

4. The Ld. CIT(A) erred in directing the Assessing Officer to tax the Capital Gains in the year of completion of project taking sale consideration at stamp duty value or actual consideration received, whichever is higher ignoring the legal provisions.

5. Any other ground that may be urged at the time of hearing."

6. With regard to ground No.1, the ld. AR submitted that AO reopened the assessment considering the findings given by CIT(A) for the AY 2008-09. He argued that CIT(A) has given direction for the other AYs. In this regard, he relied on the following case laws:

1. Rajinder Nath Vs. CIT, [1979] 120 ITR 14 (SC)
2. ITO Vs. Murlidhar Bhagwan Das (SC) [1964] 52 ITR 335
3. Computer Science Corporation of India (P) Ltd. Vs. Addl. CIT, [2014] 268 CTR 110 (MP)
4. Munjal Showa Ltd. Vs. DCIT, [2016] 382 ITR 555 (Del.)

Further, he submitted that there is no link with the tangible material for the reopened assessment for AY 2009-10. For this proposition, he relied on the judgment in the case of CIT Vs. Kelvinator India Ltd. 320 ITR 561 (SC).

6.1 With regard to merits of the case, ld. AR submitted that assessee has entered into a development agreement dated 03/02/2007 along with his two sons, namely K. Nagaraju and K. Kishore Kumar with M/s Legend Estaes Pvt. Ltd. for development of land i.e. 6 acres and 39 guntas. As per the development agreement, on receipt of approval from HUDA for construction of the building, assessee handed over the land

to the developer, but, the developer has not commenced the construction. He submitted that in the earlier year, ld. CIT(A) has adjudicated that developer has obtained municipal permission and incurred some cost, which amounts to transfer u/s 2(47)(v) of the Act owing to the jurisdictional High court decision in the case of Shri Potla Nageswara Rao vs. DCIT in ITTA No. 245 OF 2014 Dated 09-04-2014. He submitted that the above decision is on the point that agreement of sale and possession of property both took place in the same year. He submitted that the assessee has given licence to enter for development purposes and has not transferred any legal possession to the developer. Therefore, the said case will not apply to the case in hand. Further, he submitted that the developer M/s Legend Estates Pvt. Ltd. has not commenced the development project and has not shown any willingness to perform the duty, which is the main object of section 53A, that is the reason, the assessee has entered into a new development agreement with new developer namely M/s RBD Legend Infrastructure Pvt. Ltd. It clearly shows that developer has not shown any willingness on his part to carry out the conditions laid down in development agreement. This forced assessee to renegotiate the terms and a new development agreement with the new developer was entered on 11/02/2011. He, therefore, submitted that there is no transfer took place as per section 2(47)(v) of the Act during this AY. Further, ld. AR submitted that AO has not given the basis for computation and there has to be a reasonable value to be taken for computation of capital gains. In this process, he relied on the case of Smt. Krishna Bajaj Vs. ACIT, [2014] 100 DTR 370 (karn.).

6.2 Without prejudice to the above, finally, he submitted that assessee is eligible for deduction u/s 54F, even, it is assumed

that transfer took place during this AY. For this proposition he relied on the following decisions:

1. CIT Vs. Jumanmal Jain, [2017] 394 ITR 666 (Mad.)
2. Vittal Krishna Conjeevaram, [2013] 144 ITD 325 (Hyd.)

7. Ld. DR submitted that reopening should not be on isolation, but, in this case, ITAT has confirmed the findings of ld. CIT(A) for the AY 2008-09, therefore, the AO has initiated proceedings based on the registered document clauses. He further submitted that change of development agreement cannot infer anything as assessee has already parted with the land. He also submitted that assessee has entered into huge financial dealings in this project, therefore, the ld. CIT(A) has rightly decided the issue in favour of the revenue in AY 2008-09.

7.1 With regard to deduction u/s 54F, ld. DR submitted that the flats are at unfinished condition and the same are not in position of habitation and, therefore, it has not fulfilled the conditions laid down in section 54F. Further, he submitted that as per section 54F, assessee is eligible to claim deduction only on one flat.

7.2 With regard to Department's appeal being ITA No. 765/Hyd/2017, he submitted that ld. CIT(A) has taken cognizance of the amendment to section 45(5A) in the Finance Act, 2017. He submitted that since the amendment is prospective in nature, CIT(A) should not have relied on such amendment to adjudicate the matter. He relied on the following cases:

1 K. Vijaya Lakshmi and others, ITA No. 1561/Hyd/16 and others, order dated 28/02/2018.
2. Smt. G. Sailaja, ITA No. 51 & 579/Hyd/2016 and others, order dated 30/11/2017.

3. CIT Vs. Balbir Singh Maini, [2017] 398 ITR 531 (SC).

8. Considered the rival submissions and perused the material on record. We notice that assessee has entered into Joint Development Agreement (JDA) with M/s Legend Estates Pvt. Ltd. for development of land belonging to assessee and his two sons, Sri K. Nagaraju and Sri K. Kishore Kumar on 03/02/2007. This agreement was registered. As per the agreement, the developer was to obtain building approval plan from HUDA and pay the earnest money as per agreement. Accordingly, the developer has obtained the municipal permission on 05/08/2008. Except obtaining permission and making payment of earnest money, the developer has not commenced the construction of the building as per agreement. As per JDA, the developer was to complete the project within 36 months with a further grace period of 6 months. Based on this development and for the document found in the search, the AO brought to tax the capital gains in the AY 2008-09. This action was quashed by the ld. CIT(A) and directed the AO to bring the capital gains to tax in the AY 2009-10 as the possession was handed over to the developer after obtaining municipal permission.

8.1 In this AY 2009-10, the AO followed the directions of ld. CIT(A) and brought to tax the capital gains. Subsequently, on appeal, ld. CIT(A) allowed the appeal of the assessee by taking new amendment brought in by the Finance Bill 2017 and directed the AO to tax the capital gains in the year of completion of project. Ld. CIT(A) has considered the further development in this case, they are:

i) assessee entered into supplementary agreement dated 30/10/2011 in which sharing ratio was modified to 38.5:61.5 considering the market condition. Even after

modification of the terms of agreement, development in the project was not satisfactory to the assessee.

ii) Subsequently, assessee entered into another supplemental agreement dated 11/02/2011 along with another developer M/s Legend Estates Pvt. Ltd. with M/s RBD Legend Infrastructure Pvt; Ltd. through which the entire development activity was entrusted to M/s RBD Legend Infrastructure Pvt. Ltd., and kept the other conditions of development intact, this agreement was unregistered.

iii) As per original agreement, the project should have completed by 05/08/2011 (considering the date of municipal permission).

iv) Assessee entered into another supplemental agreement dated 06/11/2012 incorporating all contents of supplementary agreement dated 11/02/2011. This supplement agreement was registered.

v) Ld. CIT(A) has taken note of the current status of the project at the time of passing her order as below:

> *As on the date of passing this order, the construction is at different stages, in some of the blocks construction is in progress, some of the blocks have not even started construction. In any case, no flat is fully completed except a model flat which is constructed for showing it to customers, which is being used for office purpose by developer. Though developer entered sale agreements with purchasers and collected the amounts, it did not complete construction of any flat, did not handover any flat to the purchasers. It is reliably learnt that the purchasers have filed suit against the developer. The owner did not enter any agreement with anybody as the construction of the project is abnormally delayed and also with the fear of not coping up with the pressure from the purchasers in case the sale agreements were entered into with the prospective buyers. Though the time limit of 36 months was written in the agreements, the project is not completed even*

after 10 years. Again with the down trend in real estate business on account of demonetisation, there is no certainty as to when this project will be completed."

8.2 We have considered the submissions of both the parties and let us first deal with revenue contention.

8.3 The grounds 1 & 2 are general in nature and in ground No. 3, revenue aggrieved that ld. CIT(A) has applied the provision of Finance Bill 2017 for the transaction entered into prior to 01/04/2017. Ld. CIT(A) has considered the subsequent development and current status of the project and was convinced that the tax on capital gains cannot be charged in the AY 2009-10. She had brought on record the reasons for reaching to such conclusion.

8.4 With regard to ground No. 4, she had directed the AO to tax the capital gains in the year of completion of project by reaching conclusion as discussed in the previous para. In our view, what is relevant is the conclusion that the project is not completed and has no certainty that it will be completed in the near future even after elapse of 10 years. In this connection, we refer to the decision of the coordinate bench of this Tribunal in the case of 1786/Hyd/2012 and others in the case of Sri R. Srinivasa Rao and others, order dated 28/08/2014 wherein the bench has held as under:

"13. On going through the aforesaid decisions of the coordinate bench, the ratio which emerges is unless there is willingness on the part of the developer to perform his part of the contract, there cannot be a 'transfer' of capital asset as envisaged u/s 2(47)(v) read with section 53A of the TP Act. The ratio laid down as above squarely applies to the facts of the present case as the department has failed to controvert the finding of the learned CIT(A) by bringing material on record to show that the developer has taken any steps towards

development activity. Further, we may observe, though the AO referring to the development agreement has inferred that possession of the property was handed over to the developer, however, on going through the pleadings and prayer of the plaintiffs in the plaint filed in Civil Court, a copy of which is at page 51 of assessee's paper book, it appears assessee along with others are still having physical possession over the property. Be that as it may, after careful consideration of facts and materials on record, we are of the view, CIT(A)'s order being well founded and well reasoned needs to be upheld. Another crucial aspect which needs to be commented upon the CIT(A) has also held that the transaction will not attract capital gain as the asset transferred being an agricultural land is not a capital asset as defined uls 2(14) of the Act. This finding of "e learned CIT(A) remains unchallenged and uncontroverted by the Department. For this reason also, short term capital gain computed by the AO cannot be sustained. In view of the aforesaid, we do not find any reason to interfere with the order of the CIT(A).

14. So far as the ground raised by the department challenging the view of CIT(A) to the effect that there cannot be any capital gain in absence of value of consideration received or accrued, we are at the view, the same is not required to be adjudicated as it is of mere academic interest in view of our finding that there is no transfer of capital asset by the assessee in the impugned assessment year. Accordingly, we uphold the order of the CIT(A) by dismissing the grounds raised."

8.5 Since the issue is agitated before us, we would like to restrict ourselves to adjudicate whether the incidence of capital gains arises in the AY 2009-10 or not. We notice that AO applied section 53A of TP Act to bring this transaction as transfer u/s 2(47)(v) of the Act. For the sake of clarity, we reproduce the provisions of section 53A:

"Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part

performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that 2[***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

From the above definition, it is clear that where a contract is entered to transfer any immovable property in writing necessary to constitute the transfer can be ascertained with reasonable certainty and transferee in part performance, has taken possession of the property and has done some act in furtherance of the contract and is willing to perform his part of the contract. Therefore, the transferer transfers the possession of the property and transferee performs certain action and is willing to perform certain part of the contract, then, section 53A can be invoked. In the given case, assessee has allowed the developer to possess the land and expected the developer to get municipal permission and expected to complete the project within reasonable period. In this case, the developer except getting municipal permission, has not performed any action to complete the project on time. The sole purpose of entering into JDA is to develop the property in compensation to surrendering the ownership of agreed proportion and not just to get the municipal permission. The municipal permission allows to carry out the development activities in the land, therefore, the developer gets authorisation from the municipal authorities and the owner of the property to commence development activities, in that process, the land is handed over to the developer as the

defacto owner and the real ownership is not passed. This permission to hold the land for development does not give rightful ownership to the developer. This right accrues to the developer with a condition that the development will be done on the project on the wholesome basis. To invoke section 53A, there has to be reasonable certainty on the commitment from the developer. In the given case, the developer should have completed the project by 05/08/2011 but, assessee renegotiated the terms of the contract on 11/02/2011 and brought in another developer to complete the project. Further, ld. CIT(A) has verified the current status of the project and finds that it is still in incomplete stage and has uncertainties prevailing on completion of the project. It clearly shows that there is no reasonable certainty in the project completion. Further, we notice that AO by considering the first JDA, intends to tax on the capital gains in the ratio of 50:50, when the same was renegotiated to 38.5:61.5 ratio. The ratio has changed and new developer has taken over the responsibility of completion of the project. The basic terms have undergone change due to revision of JDA on 06/11/2012.

8.6 From the above discussion, it is clear that the possession of the land was handed over to the developer with the right of ownership as de-facto and not dejure. Therefore, the transfer in the ownership has not passed on to the developer until the developer undertakes to complete the project as per the terms or at least 90% of the project has to be complete or to the satisfaction of the parties involved in the agreement. In the given case, there is no possibility of completing the project in certainty. Considering the uncertainties and that no real development activities were carried on by the developer in AY 2009-10, in our considered view, there is no incidence of transfer of property as per

section 2(47)(v) of the Act in the AY 2009-10. Therefore, AO cannot tax the capital gains in AY 2009-10. Accordingly, ground raised by the revenue in this regard, is dismissed.

8.7 With regard to assessee's appeal, we allow ground No. 9, and all other grounds raised by assessee are not considered at this stage to adjudicate since we have already adjudicated that the tax on capital gains cannot be charged in AY 2009-10. All other issues are relating to the quantification of the capital gains and reopening of appeal.

9. In the result, appeal of the assessee is partly allowed and revenue's appeal is dismissed.

ITA Nos. 342/H/2015 and 343/Hyd/2015 by the revenue and CO. Nos. 65 & 66/Hyd/2016 by the assessees, namely, Kosetty Kishre and Kosetty Nagaraju

9. In both the appeals, the revenue has raised similar grounds, which are as under:

> *"1. The learned CIT(A) erred in both in law and on facts of the case*
>
> *2. The learned CIT(A) ought not to have held that the action u/s. 153C alone was the correct course of action relying on the decision of ITAT in the case of Mirza Rafiulla Baig, the facts of which are not identical to the present case.*
>
> *3. The Learned CIT(A) ought to have appreciated that the Assessing Officer has initiated proceedings u/s .147 of the IT Act after forming an independent opinion with regard to escapement of income on the basis of receipt of information from the AO of the searched person communicating the CIT(A) order in the assessment done by him, and not on the basis of receipt of seized document.*
>
> *4. The learned CIT(A) ought to have appreciated that the provisions of section 153C are not attracted in the present case, since the AO who was having the*

jurisdiction over the searched person did not form 'satisfaction' required as per the said provisions to transfer the related material as he was of the opinion that the entire capital gains had arisen in the hands of the assessee on whom he was having jurisdiction and assessed accordingly. Therefore, transfer of any document did not arise and consequently provisions of section 153C are not attracted.

5. Any other grounds that may be urged at the time of hearing."

10. The brief facts as taken from the case of Shri Kosetty Kishore (ITA No. 342/Hyd/2015) are, return of income was filed by the assessee on 31.07.2009 admitting a total income of Rs. 3,99,170/-. A search and seizure operation u/s 132 was conducted in the case of Sri K.Gopal Raj, father of the assessee, on 07.07.2008 in the course of which a development agreement dated 03.02.2007 between Sri K. Gopal Raj and his two sons, S/Sri K. Kishore Kumar and K. Nagaraju on the one hand and M/s. Legend Estates Pvt Ltd on the other hand, was found. As per the development agreement, the three land owners, viz., Sri K. Gopal Raj and his two sons, Sri K. Kishore Kumar and Sri K. Nagaraju, had entered into the development agreement for development of a residential/commercial complex on a 50:50 basis. An assessment u/s 143(3) r.w.s. 153A was made in the case of Sri K. Gopal Raj on 19.11.2010 bringing the entire capital gain arising from the transfer of land under the development agreement to tax in the hands of Sri K. Gopal Raj. On appeal, the CIT(A) vide his order in ITA No.185/CC-6,HYD/CIT(A)-I/2010-11, dated 28/11/2011 held that the correct assessment year in which the capital gains was assessable was AY 2009-10 and that the capital gains had to be assessed as per the share of the three individual land owners in the land. Consequently, the Assessing Officer issued a notice u/s 148 to the assessee for the AY 2009-10.

10.1 In his order, the Assessing Officer held that the assessee was liable to capital gains on the transfer arising out of the development agreement, that following the decision of the CIT(A), the capital gains was liable to tax in AY 2009-10 and that the assessee was not eligible for deduction u/s 54F against this capital gains. The Assessing Officer computed the long term capital gains at 1,04,15,866/- and assessed the total income, including the long term capital gains at Rs. 1,08,15,036/-.

11. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

12. After considering the submissions of the assessee, the CIT(A) observed as under:

> *"5.1 I have considered the facts on record and the submissions of the AR. In the case of Mirza Rafiula Baig, relied upon by the AR, the assessee had entered into an agreement of sale with one Janapriya Engineers Syndicate. A search u/s 132 was carried out in the case of Janapriya Engineers Syndicate and proceedings u/s 147 were initiated on the basis of the information received by the Assessing Officer about the agreement of sale between the assessee and Janapriya Engineers Syndicate. The ITAT held that the proceedings u/s 147 based on the information that came to light as a result of the search in the case of Janapriya Engineers Syndicate, had no legal sanctity as the same was against the spirit of the provisions of sec.153C.*
>
> *5.2 The facts in the assessee's case are identical. The development agreement, to which the assessee was also a signatory, was a document that belonged as much to the assessee as to Sri K. Gopal Raj. Under the circumstances, the relevant provision of the Act enabling the Assessing Officer to assume jurisdiction was Sec. 153C and not sec. 147. Under the circumstances, the assessment is held to be void ab initio. The second ground of appeal is allowed."*

13. Aggrieved by the order of CIT(A), the revenue is in appeal before us.

14. Considered the rival submissions and perused the material on record. We noticed that a search and seizure operation conducted on 07/07/2008 in the case of Shri K. Gopal Raj and found incriminating material that Shri K. Gopal Raj along with the assessee and his brother entered into JDA with M/s Legend Estates Pvt. Ltd. The AO initiated 153A proceedings in the case of Shri K. Gopal Raj and brings to tax whole income. Later, ld. CIT(A) directed the AO to initiate proceedings in all the cases i.e. Shri K. Gopa Raj, assessee and his brother. After search proceedings, the AO has not recorded the required satisfaction nor transferred the information to the AO of the assessee in order to initiate proceedings u/s 153C. The AO informs the 'jurisdictional AO' of assessee only upon the direction of ld. CIT(A). The AO invokes section 147 and completes the assessment.

14.1 The revenue is in appeal before us since ld. CIT(A) allowed the appeal of the assessee by following judicial precedent. The revenue has raised ground No. 3 submitting that AO has initiated proceedings u/s 147 after forming an independent opinion with regard to escapement of income on the basis of receipt of information from AO of the searched person communicating after the CIT(A)'s order and not on the basis of receipt of seized document. In our opinion, as far as this assessee is concerned, since the incriminating material was found during the search, the provisions of section 153C(2) applies. The revenue has to invoke only section 153C(2) even after receipt of information from the AO of the searched person even after direction of ld. CIT(A)'s order, provided they follow the due procedure as per section 153C. Therefore,

resorting to initiation of proceedings u/s 147 is not proper and void ab-initio.

14.2 With regard to ground No. 4, it is the contention of the revenue that section 153C is not attracted because AO who was having jurisdiction over the searched person did not form satisfaction required as per the said provisions to transfer the related material as he was of the opinion that the entire capital gains had arisen in the hands of the assessee on whom he was having jurisdiction and assessed accordingly. Therefore, section 153C not attracted. We are not in a position to accept this proposition as the liability arises on the assessee only because of incriminating material found during search. The procedure laid down for the purpose of search and seizure has to be followed otherwise, the purpose of section 153A, 153B and 153C is defeated. The provision relevant to search requires the AO of the searched person to record satisfaction and he forms the wrong satisfaction, it fails there itself. Further, as per section 153C, not only AO of the searched person but AO of the other person to whom the incriminating material allegedly belongs also has to form satisfaction before initiating proceedings u/s 153C. It cannot be compensated by invoking section 147 as the mandate of section 147 is different. Since, the liability of assessee arises only because of search proceedings, proceedings u/s 153C alone can be initiated. Therefore, we uphold the order of CIT(A) on this issue and dismiss the ground raised by the revenue accordingly.

15. As the facts and grounds in the case of Kosetty Nagaraju in ITA No. 343/Hyd/2016 are materially identical to that of Kosetty Kishore in ITA No. 342/Hyd/2015, following the

decision therein, we dismiss the grounds raised by the revenue in this case also.

16. As we have upheld the orders of CIT(A) dismissing the revenue appeals, the COs filed by the assessees have become infructuous and therefore, the same are dismissed as infructuous.

17. In the result, appeal of the assessee in ITA No. 773/Hyd/17 is partly allowed and all appeals of the revenue in ITA No. 342 & 343/Hyd/2015, ITA No. 765/Hyd/17 and CO Nos. 65 & 66/Hyd/2016 are dismissed.

Pronounced in the open court on 15th February, 2019.

Sd/-	Sd/-
(P. MADHAVI DEVI)	(S. RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated 15th February, 2019

kv

Copy forwarded to:

1.	*Shri K. Gopal Raj, 3-5-1141, Ramkote, Hyderabad.*
2.	*Shri Kosetty Kishore, 15-8-408, Feelkhana, Hyderabad.*
3.	*Shri Kosetty Nagaraju, 15-8-408, Feelkhana, Hyderabad*
4.	*DCIT, Circle – 1(3), Hyderabad*
5	*CIT(A) – 3, Hyderabad*
6	*Pr. CIT(A) – 3, Hyderabad*
7	*The DR, ITAT, Hyderabad*
8.	*Guard File*

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1.	Draft dictated on			Sr.P.S./P.S
2.	Draft placed before author			Sr.P.S/PS
3	Draft proposed & placed before the second Member			JM/AM

4	Draft discussed/approved by second Member			JM/AM
5	Approved Draft comes to the Sr.P.S./PS			Sr.P.S./P.S
6.	Kept for pronouncement on			Sr. P.S./P.S.
7.	File sent to the Bench Clerk			Sr.P.S./P.S
8	Date on which file goes to the Head Clerk			
9	Date of Dispatch of order			